92-1674

No. ____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

LARRY LEE FORTENSKY,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT AND CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of California violated Petitioner's Fourth Amendment Rights to be free from unreasonable searches and seizures when CHP officers made a traffic stop based solely on a tip of a "DUI driver" on the highway from an anonymous citizen informant relayed to the officers in the field by the dispatcher, where the officers followed the Petitioner for a mile and one-half without observing any corroboration of DUI symptoms, criminal conduct, or traffic violations?

In simplest terms, is an anonymous tip from a citizen informant standing alone probable cause for a traffic detention under the Fourth Amendment?

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SUPREME COURT OF THE UNITED STATES

October Term, 1993

LARRY LEE FORTENSKY,	)
	)
Petitioner,	)
v.	)
	)
THE STATE OF CALIFORNIA,	)
	)
Respondent.	)
	)

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT AND THE CALIFORNIA COURT OF APPEAL (4TH DIST.)

Petitioner, LARRY LEE FORTENSKY, respectfully prays that a Writ of Certiorari issue to review the opinion of the California Court of Appeal[1] which affirmed the California Superior Court, County of Riverside, Appellate Department's holding that the Municipal Trial Court's ruling denying Petitioner's California Penal Code Section 1538.5 Motion to Suppress all the evidence seized by the California

1 The real parties in interest other than Petitioner are the People of the State of California, represented by the Riverside County District Attorney's office, and the various courts in California which have ruled on Petitioner's motion to suppress evidence, which parties have been served with a copy of this Petition as set forth in the Proof of Service.

Highway Patrol (CHP) officers following a traffic detention based solely on an anonymous tip did not constitute a "possible miscarriage of justice" and was presumably not in violation of Petitioner's Fourth Amendment Rights to be free from unreasonable searches and seizures.

OPINIONS BELOW

There is no citation to the opinion of the California Court of Appeal, as no written opinion was published. However, there was a one paragraph opinion by minute order by the Court of Appeal, a copy of which is attached hereto as Exhibit "B" (App., p. 32).

The decision by the Appellate Department of the Riverside County Superior Court (without opinion) is attached hereto as Exhibit "C" (App., p. 33).

The Trial Courts ruling on Petitioner's motion to suppress is contained in the transcript of the hearing on said motion, the necessary portion of which is attached hereto

as Exhibit "D" (App., p. 34).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC Section 1257(3) on the ground that his rights under the Fourth Amendment to the United States Constitution were violated.

The California Court of Appeal entered its order rejecting Petitioner's Fourth Amendment claim on December 18, 1992; and the California Supreme Court denied a hearing for review in this case on February 4, 1993 (Exh. "A", App., p.31). The instant Petition for Writ of Certiorari is filed within 90 days of that Order as required by the Rules of this Court. [Rule 13.1.]

CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

INTRODUCTION

The California Court of Appeal summarily denied our Petition for a Writ of Habeas Corpus[2], without addressing the issue presented on appeal from the ruling of the Municipal Court on Petitioner's motion to suppress all the evidence seized by the CHP officers following the traffic detention. [Exh. "B", App., p. 32.] This issue was not squarely addressed by the Appellate Dept. of the Riverside Superior Court. That Court denied our appeal without opinion and without a word to indicate on what basis the Trial Court was correct in its ruling on the motion

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2 The proper procedure for review to the Court of Appeal from a decision by the Appellate Department of the California Superior Court in a misdemeanor is a Writ of Habeas Corpus. [In re Wallace, (1970) 3 Cal.3d 289, 292.]

to suppress. [Exh."C", App., p. 34.]

The Trial Court's decision was based on the erroneous belief that because the officers in the field received their information from a "dispatcher", they had a "duty" to make a traffic stop and investigate the tip. [Exh. "D" App., pp. 44, 45.]

The California Appellate Courts have sidestepped this important constitutional issue. The effect is that the reviewing Courts have all concluded that any tip from an anonymous citizen-informant standing alone is sufficient probable cause for a traffic detention. We respectfully submit, and will show in more detail to follow, that this is not the law in California, nor is it the law under Federal Constitutional standards. This case clearly presents a situation where the Fourth Amendment protection from unreasonable searches and seizures has been ignored as set forth in Alabama v. White, (1990) 496 US 325.

PROCEDURAL FACTS[3]

Defendant was charged in the Riverside County Municipal Court with a violation of California Vehicle Code Sections 23152(a) and 23152(b), driving under the influence of an intoxicating beverage ("DUI").

Defendant filed a timely motion under California Penal Code Section 1538.5 to suppress all evidence observed and seized by the CHP officers following the traffic stop on the ground that this was an unlawful detention, based upon unreliable information supplied by an anonymous informant. On December 11, 1991 the Trial Court denied Defendant's motion to suppress. [Exh. "D", App., pp. 34-45.]

Thereafter, Defendant elected to change his plea to "no contest" reserving his right to appeal the 1538.5 ruling. Judgment of

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3 All of the procedural facts are set forth in the "Agreed Settled Statement on Appeal", a part of the record on appeal in the State Courts and included herein as Exh. "E", App., p. 47.

Conviction on this plea was made and entered on May 19, 1992. It is from this Judgment of Conviction that Defendant appealed the 1538.5 ruling. [Penal Code, Section 1538.5(j)(m); People v. Thuy Tien Van Le, (1987) 194 Cal.App.3d 845, 848 Fn.1.]

STATEMENT OF PROBABLE CAUSE FACTS

The parties below filed an "Agreed Settled Statement on Appeal". [Exh. "E", App., p. 47.] Together with the transcript of the 1538.5 hearing on December 11, 1991 (Exh. "D", App., p. 34), these documents[4] constitute all the evidence of probable cause upon which the ruling on the motion to suppress rests. Collectively, they show without dispute the following facts:

The CHP officers received a radio call from the "dispatcher", based upon a tip from an unidentified informant, "of a DUI driver in

4 All of these documents are a part of the Clerk's Record on Appeal in the California Appellate Courts, the necessary portions of which are attached to this Petition as Exhibits in the Appendix.

a black pickup truck, California license plate No. 2X9463, in the vicinity of Green River Road and Palisades Drive." Officer Fernandez observed the vehicle, made a U-turn, and followed the suspect vehicle for "approximately a mile ... and a half". No erratic driving was observed and no traffic laws were violated. The officers stopped Petitioner's vehicle, and made observations of DUI symptoms. Certain physical evidence, including a breath test result (0.11%) were seized [Exh. "E" App., pp.49-50.]

Pursuant to California Penal Code Section 1538.5, the Fourth Amendment of the United States Constitution, and applicable Federal and California case law, Petitioner sought to suppress all the evidence seized, both the physical evidence (chemical test results) and the officer's observations of symptoms of intoxication, on the grounds that the initial traffic detention was unlawful and without probable cause.

The Trial Court denied the Motion to Suppress and it is from this ruling that Petitioner's appealed pursuant to California Penal Code Section 1538.5(j)(m).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case presents a fundamental and important constitutional question. Whether or not an anonymous tip, standing alone without any corroboration of criminal conduct in the field or absent some compelling exigent circumstances excusing the requirement of establishing reliability of the informant, is sufficient probable cause for a traffic detention under the Fourth Amendment's protection against unreasonable searches and seizures? The California Appellate Courts have erroneously upheld this Fourth Amendment intrusion on the basis that the officers had a "duty" to make the stop because they received the probable cause information from a "dispatcher", or they (the California

Courts) have sidestepped this issue by their silence in affirming the Trial Court's findings.

I

GENERAL AND CONSTITUTIONAL LAWS

The requirements of a lawful detention are clear and settled. To justify a detention, it must be apparent to the detaining officer specific and articulable facts causing him to suspect that some criminal activity has taken place or is occurring and that the person detained is involved in that activity. [In re Tony C., (1978) 21 Cal.3d 888, 892-894.]

The constitutional protection of the Fourth Amendment requires that any detention, any intrusions on a citizens freedom by law enforcement officers, be supported by probable cause. [See U.S. v. Hensley, (1985) 469 U.S. 221 at p. 226; Alabama v. White, (1990) 496 U.S. 325.] In this case, both sides agree that the only evidence of probable cause was

an anonymous citizen tip (via the CHP dispatcher) of a "DUI driver" on the highway. [App., p. 49.]

A. Evidence obtained by law enforcement officers in violation of the Fourth Amendment's right of the people to be free from unreasonable searches and seizures is inadmissible in criminal prosecutions. [Weeks v. United States, (1914) 232 US 383; Mapp v. Ohio, (1961) 367 US 643.]

B. Despite Proposition 8 (California's Criminal Reform Law) which seemingly abolished independent state grounds for excluding any relevant evidence in criminal proceedings, the Exclusionary Rule still applies in state actions to seizures of evidence in violation of the Fourth Amendment. [In re Lance W., (1985) 37 Cal.3d 873; People v. Neer, (1986) 177 Cal.App.3d 991, 999.]

C. This principle, the Exclusionary Rule, applies to temporary detentions -- a situation where a person, short of an arrest,

is nevertheless prevented from leaving as the result of a show of official authority. [In re James D., (1987) 43 Cal.3d 903, 911; Florida v. Royer, (1983) 460 US 491, 497.] Obviously, in this case, when the officers made a traffic stop by use of their "red lights" a detention occurred. In United States v. Hensley, (1985) 469 U.S. 221 at p. 226, this Court held that ". . . stopping a car and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment."

D. Grounds for Detention (the law in California).

The California Supreme Court held In re Tony C., that because there was insufficient cause for detention, the fruits of the illegal detention should have been suppressed. [21 Cal.3d at p. 899.] That Court's extensive discussion of the law of "reasonable cause" for detention may be summarized as follows:

(1) Courts must be diligent to protect

a citizen's rights to use public places without "unwarranted interference or harassment by agents of the law."

(2) To justify a detention, there must be apparent to the officer, specific and articulable facts causing him to suspect that some activity relating to a crime has taken place, or is occurring and that the person detained is involved in that activity.

(3) The officers's suspicion must be "objectively reasonable" so that "any reasonable police officer in a like position, drawing when appropriate on his training and experience" would reach the same conclusion. In other words, "the subjective suspicion must be objectively verified and cases to the contrary are disapproved." [In re Tony C., (1978) 21 Cal.3d at 892, 894. Emphasis added, See also People v. Gallant (1990) 225 Cal.App.3d 200.]

II

AN ANONYMOUS TIP STANDING ALONE IS NOT REASONABLE CAUSE FOR DETENTION

Cases dealing with this subject indicate that while information from an untested informant would not justify a warrantless arrest or search, it may (but not always, and that is the issue here) suffice for an investigative stop. [See Alabama v. White, (1990) 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301; Adams v. Williams, (1972) 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921; People v. Lissauer, (1985) 169 Cal.App.3d 413, 422.]

However, the reliability of the information must be established. A tip from an anonymous informer is usually held inherently unreliable and therefore, requires corroboration of criminal activity. [See Alabama v. White, supra, 110 L.2d at pp. 308, 309.]

An unverified tip from a known informant

may carry enough "indicia of reliability" to justify an investigative stop, even when the tip is not sufficiently reliable to establish probable cause. [Adams v. Williams, Supra, 321 L.Ed. 2d 612, at pp. 617, 618.] The appropriate inquiry is whether, based on the information, a reasonable police officer would suspect "that a particular person is engaged or has engaged in criminal conduct . . . ." [People v. Superior Court (Meyer), (1981) 118 Cal.App.3d 579.]

In Adams v. Williams, (supra, 321 L.Ed.2d pp. 617, 618), the U.S. Supreme Court concluded that anonymous tips must be corroborated. In California, the law is the same. Reliability and verification of the probable cause information is required under In re Tony C.:

> "[T]he subjective suspicion must be objectively verified and cases to the contrary are disapproved." [21 Cal.3d at p. 894. Emphasis Added. See also the holding of this Court in Whiteley v. Warden, etc. (1971) 401 U.S. 560, 91 S.Ct. 1031, 28

L.Ed.2d 306 at p. 313.]

In this case, we only have the conclusionary information of an unidentified citizen informant via the CHP dispatcher as the basis of probable cause because the CHP officers did not observe any criminal activity or any corroborating evidence, even though they followed Petitioner for a mile and one-half. [App., p. 40.] The alleged criminal activity, "DUI driver" on the highway, was therefore not "objectively verified."

A. The proper discharge of an officer's duty is not in and of itself legal justification for a detention.

Respondent (The People of the State of California) argued below, the Trial Court agreed, and the California Appeal Courts seemingly approved that Petitioner's detention in this case was "necessary to the proper discharge of the officer's duties" and for that reason alone, the detention was justified. [App. pp. 40-45.] This is simply

not the law, and it begs the constitutional issue of probable cause. For example, it is obvious that an officer has a "duty" to execute a search warrant issued by a court of law, but this exercise of duty does not validate the admissibility of the evidence seized pursuant to that search warrant. If challenged by a defendant, the prosecution must still justify the seizure under constitutional guidelines.

Furthermore, this Court has expressly held that the fact that the officers who initiated a traffic detention, arrest, and subsequent search of a vehicle did so on information received from the police dispatcher via the police radio (of information originally supplied to the police by an untested informant), did not give the officers in the field probable cause for their actions.

> "We do not, of course, question that the Laramie police were entitled to act on the strength of the radio

> bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." [Whiteley v. Warden of Wyoming Penitentiary, (1971) 401 U.S. 560, 28 L.Ed.2d, 306, at p. 313. See to the same effect, U.S. v. Jordan, (C.A. Ky 1976) 530 F.2d 722, 726 F.N. 4.]

B. Information supplied by a citizen informant as the basis of probable cause for a detention must be proven reliable by either identifying the citizen or, if anonymous, the officers must corroborate the information through further investigation.

The information is reliable if we know the identity of the citizen informant. [Adams v. Williams, (1972) 407 U.S. 143, 321 L.Ed.2d 612 at p. 617; People v. Ramey, (1976) 16

Cal.3d 263, 269.] If the informant is anonymous, then the information must be objectively verified by the CHP investigation in the field before the requirements of In re Tony C. are met. This requires some corroboration of criminal activity[5] [In re Tony C., supra, p. 388; People v. Ramey, supra, p. 269; Thompson v. White, (C.A. La. 1969) 406 F.2d 1176, 1178.]

Respondent cited two U.S. Supreme Court decisions to support their argument below that an anonymous tip need not be proven reliable, and perhaps the California Courts relied on these cases in its decisions. These cases (White and Gates, infra) simply do not stand for that proposition which, if true, would give carte blanc to any information supplied by an anonymous informant as the basis of probable cause. Quite the contrary, according

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5 Matching vehicle description as well as direction of travel with the "tip" supplied by the informant does not constitute corroboration of "criminal activity" necessary to make the "tip" reliable for probable cause. [U.S. v. Lenkin, (C.A. Ca. 1374) 510 F.2d 13, 15.]

to this Court in those cases, the anonymous tip must be sufficiently corroborated before it can justify a detention.

First, in Alabama v. White, (1990) 496 US 325, 10 S.Ct. 2412, 110 L.Ed.2d 301, a traffic stop case, the Supreme Court upheld the detention, not on the grounds that an anonymous tip need not be proven reliable, but because under the "totality of the circumstances" (Gates, infra.), the officers had sufficient corroborative evidence to justify the stop. In a 4 to 3 decision, this Court held that the stop was justified because not only had the informant given a detailed description of the defendant, her vehicle, her residence, but also provided specific information of the defendant's "future behavior," i.e, that she was going to a particular hotel on a future date, which demonstrated, as the Court stated, a specific familiarity with defendant's affairs. It was this circumstance which tilted the Majority to

support the detention, even though they recognized the danger of anonymous tips as justification for Fourth Amendment intrusions.

In the case at bar there was no "future conduct"; no one even knew in which direction the pick-up truck was traveling. [App., pp. 36-37.]

The Majority in White relied on Illinois v. Gates, (1983) 462 U.S. 213, 76 L.2d 527 cited by Respondent below and Adams v. Williams, supra. However, all three of these cases recognize the general rule that an anonymous tip alone seldom demonstrates probable cause for detention. In White, the U.S. Supreme Court stated:

> "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized, 407 U.S., at 147, 32 L.Ed.2d 612, 92 S.Ct. (1912). Simply put, a tip such as this one, standing alone, would not warrant a man of reasonable caution in the belief that [a] stop was appropriate. Terry, supra, at 22, 20 L.Ed.2d 889, 88 S.Ct. (1868),

> quoting Carroll v. United States, 267 U.S. 132, 162, 69 L.Ed. 543, 45 S.Ct. 280, 39 ALR 790 (1925)." [110 L.2d at p. 308.]

While the Majority in White found sufficient corroboration of the tip to justify the initial detention, the Minority disagreed vigorously (in Gates as well) and pointed out the danger of such untested information.

> "...[U]nder the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from overzealous and unscrupulous officers as well as from those who are conscientious and truthful. This decision makes a mockery of that protection." [White, supra. p. 311.]

Thus, any officer willing to bend the rules can justify a traffic stop on an "anonymous tip" without any corroboration if we let the decision stand in this case.

The case at bar does not meet the

"totality of circumstances" test of White and Gates to justify the traffic stop on this anonymous tip. There was no overwhelming familiarity of Petitioner in the given information to justify the officer's actions. In White, the defendant went to the hotel she was predicted to go by the informant, which is at least some specific corroborative evidence (though not criminal activity, and that is the questioned fallacy of the Majority's reasoning in White). Furthermore, White deals with future conduct not present conduct, which is the case here.

Thus, neither White nor Gates disapprove of the principal of People v. Ramey, (1976) 16 Cal.3d 263, 269 relied on by Petitioner in this case; that is, that an anonymous tip is not justification for a traffic stop absent corroboration of criminal activity or excused by some compelling exigent circumstance.

III

ONLY EXIGENT CIRCUMSTANCES CAN EXCUSE THE REQUIREMENT OF ESTABLISHING RELIABILITY OF AN ANONYMOUS INFORMANT.

The leading case in California is People v. Ramey, (1976) 16 Cal.3d 263. In Ramey, the California Supreme Court stated:

> "It may therefore be stated as a general proposition that private citizens who are witnesses to or victims of a criminal act, absent some circumstance that would cast doubt upon their information, should be considered reliable. This does not, of course, dispense with the requirement that the informant -- whether citizen or otherwise -- furnish underlying facts sufficiently detailed to cause a reasonable person to believe that a crime had been committed and the named suspect was the perpetrator; and the rule also presupposes that the police be aware of the identity of the person providing the information and of his status as a true citizen informant. (People v. Abbott, (1970) 3 Cal.App.3d 966, 970-971 [84 Cal.Rptr. 40.) In short, probable cause will not be provided by conclusionary information or anonymous informants,..." [16 Cal.3d 268, 269. Emphasis Added. See also Whiteley v. Warden, etc. supra, 28 L.Ed.2d 306, at p. 313.]

Thus, probable cause cannot be supplied by either "conclusionary information" or "anonymous informants." That is exactly what we have in the case at bar, a conclusionary statement, i.e., a "DUI driver...," and this statement came from an anonymous informant. Based on the requirements of White, Gates, and In re Tony C., supra, the results should be the same in this case. The CHP officers' subjective suspicions based entirely on the conclusionary information of an anonymous tip were not "objectively verified" by observations of criminal activity in the field.

IV

NO EXIGENT CIRCUMSTANCES EXIST IN THE CASE AT BAR

In the Trial Court and on Appeal, Respondent relied on People v. Willard, (1986) 183 Cal.App.3d Supp. 5. This case actually supports Petitioner's position here, since that case was an "exigent circumstances" case

excusing the requirements of People v. Ramey, supra. In Willard, the California Appellate Court correctly reasoned:

"The exigency of the situation was apparent. Both the motorist and the officer were in moving traffic; the freeway entrance was a short distance away; and the defendant would have been long gone if the officer had detained the motorist to obtain a name and address and enough information to satisfy himself that the motorist was reliable. In addition, there is no evidence that there was anything about the motorist to suggest that he was acting from ulterior motive, and he acted openly, exposing himself to the identification. Furthermore, as a motorist on the highway, he, himself, was exposed to the hazard of a drunk driver immediately behind him in his lane of traffic. We conclude from all the facts and circumstances that the motorist was a reliable citizen witness and that the officer could rely on the information he received." [183 Cal.App.3d Supp. at p. 8 Emphasis Added.]

Respondent argued below that the case at bar falls within the "exigent circumstance" exception of Willard. Respondent asserted that "the exigency described in Willard is the mere fact that a motorist, suspected of driving while under the influence of alcohol, was on a public highway and posed a threat to all other motorists." That is simply not the

case. The Willard Court expressly stated that the "exigency of the situation" was that both the officer and citizen-informant "were in moving traffic, the freeway entrance was a short distance away, and the defendant would have been "long gone" if the officer had detained the motorist (informant) to obtain a name and address and enough information to satisfy himself that the motorist was reliable." [193 Cal.App.3d Supp. at p. 8.]

In other words, in Willard a DUI case is not an exigent circumstance that excuses the requirements of People v. Ramey, but the exigent circumstances are that there was no time to stop the informant and verify his identity because the defendant would have been "long gone." Here, Petitioner was not "long gone." The officers followed him for a mile and one-half and made the traffic stop on a surface street, not a freeway entrance. There were no exigent circumstances in this case. The citizen informant was not clothed with

reliability. The detention here was unlawful.

V

STANDARD OF REVIEW

While a trial court's findings at a hearing on a motion to suppress must be upheld if they are supported by substantial evidence, reasonableness of the search and seizure is an issue of law, and the appellate courts shall conduct an independent review of the trial court's conclusion in that regard. [People v. Gallant, (1990) 225 Cal.App.3d 200, 206.] It is apparent that an independent review was not done in this case.

Furthermore, the California Court of Appeal decision here that "no possible miscarriage of justice" occurred in this case is not only in error, but the "miscarriage of justice" standard is not applicable in cases testing a Fourth Amendment seizure. [People v. Hill, (1974) 12 Cal.3d 731.] Even so, in this case, there is an obvious "miscarriage of justice" because without the evidence seized

by the Fourth Amendment intrusion, there is no evidence of a violation of California's "DUI" law. [Champman v. California, (1976) 386 U.S. 18, 24.]

VI

CONCLUSION

Here, the tip was anonymous. It is presumed unreliable. There were no exigent circumstances here to excuse establishing reliability of the informant. The statement of criminal conduct was conclusionary, not factual, i.e., a "DUI driver...". It was not corroborated because the officers did not observe any DUI symptoms (erratic driving), traffic violations, or criminal conduct in the field. Since there was no separate probable cause to justify the stop, the detention was constitutionally unlawful, and the evidence seized must be suppressed. The decisions of the California Court of Appeal, the Appellate Department of the Riverside Superior Court and the Trial Court should be reversed.

This case presents an important question of law. Fourth Amendment Constitutional rights have been violated. This case, as it now stands, sends the wrong message to our police and trial courts: you can justify any traffic detention simply by stating it was based on an anonymous tip. We must maintain our basic constitutional principle that the rule of law controls our law enforcement activities and not the rule of man. It is left for this Court to correct that message.

For the reasons stated, this Petition for Writ of Certiorari should be granted, and this cause set for oral argument.

IVERSON, YOAKUM, PAPIANO & HATCH

Neil Papiano
Attorneys for Petitioner
LARRY LEE FORTENSKY

APPENDIX A

No. CA 4/2 E012039 - S030500

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

IN RE LARRY LEE FORTENSKY

ON

HABEAS CORPUS

Application for stay and petition for review DENIED. (In re Terry (1971) 4 Cal. 3d 911, 926-927; In re Sterling (1965) 63 Cal. 2d 486, 489-490.)

SUPREME COURT FILED FEBRUARY 04, 1993

Robert Wandruff Clerk

LUCAS

Chief Justice

EXHIBIT "A"

APPENDIX B

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re LARRY LEE FORTENSKY,	)	
	)	E012039
on Habeas Corpus	)	COUNTY NO.
	)	App. 1745

THE COURT:

The petition for writ of habeas corpus is DENIED. We find neither an act in excess of jurisdiction nor a possible miscarriage of justice justifying further review. In denying certification, the appellate department presumably felt that this case did not present an important question of law. We are not persuaded that this view is incorrect.

FILED DECEMBER 18, 1992
COURT OF APPEAL FOURTH DISTRICT

EXHIBIT "B"

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF RIVERSIDE

(APPELLATE DEPARTMENT)

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff & Respondent	)
vs	) Case No.) APP-1745
LARRY LEE FORTENSKY Defendant & Appellant	) DECISION ON) APPEAL) C o r o n a) #065783-04

The above entitled cause having been heretofore fully argued and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED that the Judgment of the Municipal Court of the Corona Judicial District, County of Riverside in the above entitled cause, is hereby AFFIRMED.

EXHIBIT "C"

APPENDIX D

IN THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF RIVERSIDE CORONA JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	CASE NO. 65783
vs.	)	
LARRY LEE FORTENSKY	)	
Defendant.	)	

MOTION

Proceedings had before the Honorable Michael F. Flynn, Judge of the Municipal Court of the County of Riverside, Corona Judicial District, December 11, 1991.

APPEARANCES:

For the Plaintiff: Office of the District Attorney: PATRICIA ERIKSON
4075 Main Street
Riverside, California 92501

For the Defendant: RICHARD M. MOORE
Attorney at Law
624 S. Grand Avenue
27th Floor
Los Angeles, California 90017

REPORTED BY:
CRYSTAL RAYMER, CSR NO. 6795

EXHIBIT "D"

GARY ALLEN LOOP

called as a witness by and on behalf of the People, having first been duly sworn, was examined and testified as follows:

THE COURT: All right, Ms. Erikson.

MS. ERIKSON: Thank, you, Your Honor.

DIRECT EXAMINATION

(BY MS. ERIKSON)

Q. Officer Loop by whom are you employed:

A. California Highway Patrol.

Q. For how long have you been a highway patrolman?

A. As of this date?

Q. Yes.

A. Twelve years.

Q. And what is your current assignment?

A. Riverside area office.

Q. Were you on duty on October 26, 1987, at approximately 9:50 p.m.?

A. Yes, I was.

Q. And were you in a marked patrol unit at that time?

A. Yes, I was.

Q. Were you in uniform?

A. Yes.

Q. Were you alone or were you with a partner?

A. By myself.

Q. What was your location at approximately that time?

A. The area of Green River Drive and Palisades.

Q. Do you recall if a call came through dispatch regarding a possible driving under the influence suspect at that time?

A. Yes.

Q. And do you recall the substance of that call?

A. It was put out over the air from our dispatch a possible DUI driver in a black pick-up truck. And then the dispatcher gave

out the license of that particular truck. I don't recall what the plate is at this moment.

Q. Now, shortly thereafter did you observe a vehicle that matched that description?

A. Yes, I did.

Q. And what did you do after you observed that vehicle?

A. I was near the intersection of Palisades and Green River Drive when I observed that truck heading westbound on Green River toward the 91 freeway. And I knew that I had another officer, Officer Fernandes, in the area. When the truck passed my location I noticed the license plate matched the one that was put out over the air, and I got on the car-to-car radio and advised Officer Fernandes that the vehicle was heading in his direction.

Q. Shortly thereafter did you receive a call from Officer Fernandes?

A. Yes, I did.

Q. What was the nature of that call?

A. Officer Fernandes said he observed the truck pass his location -- I don't know what his location was at that time -- and that he turned around and was behind the vehicle at that time.

Q. Did you join Officer Fernandes?

A. Yes, I did.

Q. And did you subsequently stop the vehicle in question?

A. Officer Fernandes stopped the vehicle.

There's a Shell station at the Green River area off ramp to the 91 freeway. And just about the time that the truck was entering the gas station parking area is when I finally caught up to Officer Fernandes and was behind him.

Q. Were you able to determine who was driving the vehicle at the time?

MR. MOORE: Well, Your Honor, that's not an issue. It's admitted on -- in this hearing that the defendant was the driver of that vehicle.

MS. ERIKSON: Fine, Your Honor. No further questions.

THE COURT: Mr. Moore.

MR. MOORE: No cross-examination, Your Honor.

THE COURT: Thank you, Officer Loop. You may step down.

MS. ERIKSON: People call Officer Sebastian Fernandes.

SEBASTIAN E. FERNANDES

called as a witness by and on behalf of the People, having first been duly sworn, was examined and testified as follows:

THE COURT: All right, Ms. Erikson

MS. ERIKSON: Thank you, Your Honor.

DIRECT EXAMINATION

(BY MS. ERIKSON)

Q. Officer Fernandes, who do you work for?

A. California Highway Patrol.

Q. For how long have you worked for the California Highway Patrol?

A. Eleven years.

A. At a distance of approximately a mile, mile and a half.

Q. And did that vehicle match the description of the license plate that was given to you over dispatch?

A. Yes.

MS. ERIKSON: No further questions, Your Honor.

MR. MOORE: No questions, Your Honor.

....

THE COURT: Well, obviously both of you have raised quite a number of interesting issues. I don't recall which one of you said it, but we've heard it a million times anyhow, every case has to be determined on its own

physical facts. These other cases can offer us guidance to certain degrees and as to how the particular law applies in each and every case.

Mr. Moore, one of the areas that you've raised here, although nobody touched upon in their briefs, moving papers or responsive papers, was the Harvey-Madden Rule. You were touching on that as far as the dispatcher goes, although I don't think it has application here.

I think that we can assume for purposes of this hearing that he individual, whoever it was the called the dispatcher, was a citizen informant. And usually the only areas that we get into in differentiation between the different kind of informants, citizen informants as opposed to confidential informants and what the weight we have to put on this respective this, is ordinarily in search warrants. Obviously we don't have that

type of a situation here. Clearly if we had, someone coming to a magistrate to get a search warrant, or arrest warrant, then there would certainly -- if you have an untested, unreliable informant, you certainly have to have some corroboration. I think we all know that citizen informants, as such, is put in a different light than an untested, unreliable informant. So I'll assume here, and I think we can all assume, that whoever called dispatch was a, "citizen informant."

The cases, as you have all set forth, some of them have partial application. Obviously, every one of them are somewhat different as far as the facts are concerned, and that's often times the case. But without touching on every issue that each of you raised, as I see the situation here, we are talking about probable cause. And in this case, probable cause not to arrest -- because clearly I think it's accepted by everybody

that there was not probable cause to arrest, but what we're talking about here is probable cause to detain. And, again, without getting into the -- all of the possible semantics involved, we talk about duties and rights. And sometimes I don't exactly know how we can differentiate between those two things. I am aware, as everybody in the courtroom is aware, that this type of situation that we have here today and in today's society there is a potential for misuse of someone calling the CHP dispatch. People get into it on the freeway, somebody flips the bird to somebody, and they'll call CHP and say this guy's drunk.

But the bottom line is the detention, albeit, in some cases, a very brief detention, I feel outweighs -- in other words, the being stopped is a traumatic experience. There's no question about that. And as I say, there is a potential for misuse. But when we talk about the duties of those officers, out on the

highway, and especially in today's trying times, with congestion -- I don't have to talk about the congestion on the freeway -- and somebody talking about the potential of having a drinking driver out there, these officers I think would be remiss in their duties if they did not follow through to see.

As far as the information, the corroboration goes, number one, they were given a dispatch on a certain kind of a vehicle, together with a license number. They saw that particular described vehicle with that particular license number. At that point and time, it would appear to me that they would have an absolute duty to investigate further.

Now, it's true, based upon the evidence, that neither officer say any erratic driving of any nature, but that doesn't -- its doesn't follow that they didn't have a duty to go forward. And I think they did. As I say,

there is room, potentially, for misuse of the process, there is no question about that. But I don't know about you, but I myself would rather be detained at least for a very short time to make a determination of whether I was driving under the influence of not as opposed to the officers doing nothing and letting any potential drunk driver on the freeways.

Exigency, again, Mr. Moore, just that you keep bringing it up. We ordinarily use that term to mean the same thing as emergency. So, again, without getting into connotations or denotations of words, if the situation were that they received the information, they spot the vehicle, they've got to do something at his point and time. That's, to me, exigent circumstances under this particular factual situation. I think that the officers acted properly. And they had a duty to do what they did and they did it. The motion to suppress under 1538.5 is denied.

STATE OF CALIFORNIA)
)ss.
COUNTY OF RIVERSIDE)

I, CRYSTAL RAYMER, Certified Shorthand Reporter #6795, do hereby certify:

That on December 11, 1991, in the County of Riverside, State of California, I took in shorthand and true and correct report of the testimony given and proceedings had in the above-entitled cause, and that the foregoing is a true and accurate transcription of my shorthand notes, taken as aforesaid, and is the whole thereof.

DATED: Riverside, California, January 14, 1992.

/s/
CRYSTAL RAYMER, CSR #6795

APPENDIX E

THE MUNICIPAL COURT, CORONA JUDICIAL DISTRICT COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. LARRY LEE FORTENSKY, Defendant.	CASE NO. 065783-04 AGREED SETTLED STATEMENT ON APPEAL

PROCEDURAL FACTS

The Complaint was filed on January 5, 1988, accusing Defendant of violating Vehicle Code §§ 23152(a) and 23152(b), driving under the influence of an intoxicating beverage, alleged to have occurred on Oct. 26, 1987. Defendant was arraigned on May 11, 1988.

The case was continued several times at

Defendant's request to... Finally, on Sep. 15, 1988, Defendant failed to appear and a bench warrant was issued for his arrest.

Even though the Court issued the warrant ... Defendant's DMV record shows no "Failures to Appear."

Defendant learned through the news media that there was an outstanding warrant in this case and he voluntarily appeared in Court on October 10, 1991 with present counsel.

On Oct. 29, 1991 Defendant filed a motion to suppress all the evidence observed and seized by the CHP officers in this case following the traffic stop on the grounds that the traffic stop was an illegal detention, based upon unreliable information from an unidentified informant.

The hearing on Defendant's Motion to Suppress was heard by on Dec. 11, 1991. The Court denied the Motion to Suppress. ....

The facts supporting the detention and arrest and seizure of evidence are not in dispute. They are as follows:

According to the arrest report in this case and the testimony of officers Fernandez and Loop at the hearing on the Motion to Suppress, Officer Fernandez received a radio call from the dispatcher, based upon an unidentified informant, "of a DUI driver in a black pickup truck, California license plate #2X94634, in the vicinity of Green River Road and Palisades Drive." Following that call, Fernandez was advised by Officer Loop via the radio that the suspect vehicle was headed in his direction on Green River Road. Officer Fernandez observed the vehicle approaching him and made a U-turn and "followed the suspect vehicle for a mile to a mile and a half so that Officer Loop could catch up." No erratic driving was observed by either officer and no traffic laws were violated. [See Rptr's Tran

- Dec. 11th hearing.] Later, as the vehicle approached the SK-91 over-crossing, Officer Fernandes activated his overhead red lights and effected a traffic stop. Defendant was the driver along with two passengers in the truck.

As a result of this traffic stop, the officers made observations of DUI symptoms, such as alcoholic speech, breath, etc., and a field sobriety test was administered. Certain physical evidence, including open beer containers and a breath test result (0.11%) were seized as a result of Defend- ant's detention and arrest.

Pursuant to Penal Code §1538.5 and applicable California law, Defendant sought to suppress ALL the evidence seized, both the physical evidence and the officer's observation of symptoms of intoxication, on the grounds that the initial traffic detention was illegal.

The Court denied the 1538.5 Motion after reconsideration on January 29, 1991 and it is from this ruling that Defendant appeals pursuant to Penal Code § 1538.5(j).

GROUNDS FOR APPEAL

The traffic stop, detention, and search and seizure of physical evidence and the observations of the officers following the initial traffic stop were unreasonable and in violation of the Fourth (4th) and Fourteenth (14th) Amendments of the U. S. Constitution and in violation of the California State Constitution and laws governing lawful detentions.

DATED: February 25, 1992

LAW OFFICES OF RICHARD M. MOORE

By: _____
/s/ Richard M. Moore
Attorney for Defendant
LARRY LEE FORTENSKY

DATED: March 5, 1992

By: _____
/s/ Patricia Erikson

Deputy District Attorney of
Riverside County
Attorney for Plaintiff
THE PEOPLE OF THE STATE OF
CALIFORNIA